NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 131/2000

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

R.v. SHABADINE PEART

Jack Hines for the appellant

Terrel Lawrence-Butler, Crown Counsel for the Crown

15, 16, 17 July 2002 and 19 December,2003

DOWNER, J.A.

INTRODUCTION

Before Wesley James J and a jury the appellant Shabadine Peart was convicted on 10th June, 2000, for capital murder in contravention of section 2(1)(d) (i) of the Offences against the Person Act as amended ("the Act") and pursuant to section 3(1) sentenced to death. He did not seek to address the Court on sentence which was assumed to be mandatory. He has been on death row since conviction.

As regards the merits of the case my brother Smith J A has examined with care the relevant grounds of appeal and found that the conviction must be affirmed. I am in agreement with that finding, and might only refer to that aspect of the case where it is necessary to elucidate on the constitutionality of

the sentence. The important issue of constitutional law to be determined is whether, since the enactment of the Constitution on August 6, 1962 - the appointed day –the sentence of death imposed by the Court should be construed as discretionary rather than mandatory as was the case before the appointed day.

This issue was dealt with by this Court in the closely reasoned judgments of Forte P, Panton J A and Clarke JA(Ag.) in the case of **Lambert Watson v. R. No. 2** SCCA 117/99 delivered 16th December 2002. The decision of the Court was that the mandatory sentence of death was saved by Section 26(8) of the Constitution. The Court came to that decision on a reference by the Board and its decision on the issue is presently on its way to the Board for a final determination.

Prior to the hearing of **Lambert Watson** this Court [Downer J.A. dissenting, Panton J A and Clarke J A Ag.] in **R.v. Dale Boxx** SCCA 123 of 2000 also decided that a mandatory sentence of death was permissible since the appointed day. The written judgments in both cases were delivered on the same day. Of equal significance was that the judgment of the Board in **The Director of Public Prosecutions v Mollison No. 2** Privy Council Appeal No. 88 of 2001 was delivered on 22nd January 2003. This is the first post **Mollison** judgment.

Understandably, the issue is of exceptional public importance so that when the hearing of this case commenced, before reasons were delivered in

Lambert Watson or Boxx, counsel was directed to file and argue a ground of appeal on the issue of the mandatory sentence of death. We also took the precaution of ordering a Social Enquiry Report with a clear intimation that this Court was willing to hear evidence if necessary in mitigation. The Social Enquiry Report has now been submitted to the Registrar.

The further supplementary ground filed and argued by Mr. Hines reads as follows:

> "GROUND 6
>
> The constitutional rights of the applicant were violated when the court sentenced him to death in the following ways:
>
> 1. Section 20 (1) of the constitution was breached as he was not afforded a fair hearing as to sentence.
>
> 2. Section 17 (1) of the constitution was breached as the sentence constituted inhuman and degrading punishment in its application.
>
> 3. The nature of the imposition of the death penalty violated the doctrine of the separation of powers."

When the judgment in **Lambert Watson** was delivered, had I agreed with it, there would have been no need to write this judgment. Two courses were open to me. I could simply say I adhered to the reasons I had put forward in **Boxx.** Or I could re-examine the issues.

I have decided to retrace my steps in the hope that my second thoughts on this important issue might be expressed with greater depth and

clarity. I propose to demonstrate firstly that the Constitution provides for a discretionary sentence of death for murder since the appointed day. It follows therefore that Section 26(8) of the Constitution cannot save the mandatory sentence of death which existed prior to the appointed day. On the contrary section 26(8) by the use of double negatives for emphasis created a special regime which empowers the judiciary to presume laws in force on the appointed day which were inconsistent with the provisions of Chapter III of the Constitution to be consistent with those provisions. Secondly, since the Act was amended to create two categories of murder, Section 26 (8) has no relevance as the amendment was no longer a law in force, but new legislation. Thirdly, I propose to show that all the Act did, and could do, was to reduce the number of offences for which there was a discretionary death sentence. Fourthly, it is proposed to demonstrate how the role of the Prerogative of Mercy, an executive act, relates to the judicial act of imposing a discretionary death sentence. Fifthly, it is proposed to examine the cases which bear upon the principle of the separation of powers as well as Chapter III of the Constitution which are relevant to a discretionary sentence of death. Further there will be an attempt to answer the question as to why this issue has just come to the fore, in view of the fact that the Constitution has been in operation for forty years.

How the Constitution provided for a discretionary death sentence since the appointed day on August 6, 1962 by:

(a) The mandatory rule of construction pursuant to Section 4 (1) of the Order in Council
(b) The principle of separation of powers
(c) The provisions of Section 26(8) of the Constitution which presume laws in force before the appointed day to be consistent with the Constitution

(a) That the Constitution is the supreme law is expressly stated in section 2 of the Constitution. It reads as follows:

> "2. Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

At the commencement of the Constitution, the existing legal system was made up of legislation, delegated legislation, and the common law which included prerogative powers. They are described as "existing laws", or "laws which are in force" in the Order, and they must be brought into conformity with the Constitution if the supremacy clause in the Constitution is to prevail.

The Constitution was brought into being by the Jamaica (Constitution) Order in Council 1962 ("the Order"). This Order was made pursuant to Section 5 of the 1962 West Indies Act (UK), the enabling Act. Then the 1962 Jamaica Independence Act (UK) repatriated the Constitution to Jamaica by divesting the Imperial Parliament of all responsibility for making laws governing Jamaica. The Jamaican Parliament was now empowered to repeal Imperial Acts which were applicable to Jamaica. Section 4 of the Order makes provision for the

existing laws to be brought into conformity with the Constitution. Here is how the Order is to be cited. Section 1 reads:

> "1.-(1) This Order may be cited as the Jamaica (Constitution) Order in Council 1962."

Section 2 revoked the previous Constitutional instruments and saved four important regulations which are not pertinent to this case.

Then Section 3(1) of the Order established the Constitution thus:

> "3.-(1) Subject to the provisions of subsection (2) of this section and the other provisions of this Order, the Constitution of Jamaica set out in the Second Schedule to this Order (in this Order referred to as "the Constitution") shall come into force in Jamaica at the commencement of this Order."

There are three other relevant sections of the Order which emphasize the link between the Order and its Second Schedule. The first of these relevant sections is 4(1) which reads as follows:

Existing laws

> "4.-(1) All laws which are in force in Jamaica immediately before the appointed day shall(subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

Since the Second Schedule is part of the Order, it is patent that the existing laws or the laws in force must be brought into conformity with the Constitution.

There are two features to note as regards Section 4(1)of the Order. Firstly, it recognizes the three organs of government, the Legislature to enact laws, the Executive to promulgate delegated legislation pursuant to Acts of Parliament and to administer the laws, and the Judiciary to construe legislation and the Constitution, and further to declare the common law. The Legislature and the Executive are mandated to amend while the Judiciary is mandated to construe existing laws so as to bring them into conformity with the Constitution. It follows that from the very commencement of the Order which governs the Second Schedule, the constitutional principle of separation of powers is recognized as applicable to the Constitution.

The other relevant sections in this Order are sections 21 and 22. They read as follows:

> "22.-(1) In this Order references to any body or to any office shall be construed, in relation to any period before the commencement of this Order, as references to such body or such office as constituted by or under the existing Orders, and references to the holder of any office shall be similarly construed.
>
> (2) The provisions of section 1 of the Constitution shall apply for the purposes of interpreting this Order as they apply for interpreting the Constitution."

So the Interpretation Clause of the Constitution in the Second Schedule is also applicable to the Order.

The other relevant link between the Order and its Second Schedule is Section 21 of the Order which deals with alteration. It reads:

> "21.-(1) Parliament may alter any of the provisions of sections 1 to 22 (inclusive), other than section 15, of this Order including this section in the same manner as it may alter the provisions of the Jamaica Independence Act, 1962
>
> (2) Parliament may amend from time to time or repeal, in so far as it forms part of the law of Jamaica, section 15 of this Order by an Act passed in accordance with the provisions of paragraph (b) of subsection (4) of section 49 of the Constitution."

In summarizing the effect of Sections 1-22 of the Order it is appropriate to state that it contains the citation in Section 1. It establishes the Constitution in its Second Schedule and it contains transitional provisions generally. These transitional provisions were necessary, since the First Schedule to the Order revoked the Constitutional instruments in operation prior to the appointed day. Of prime importance is Section 4(1) of the Order which provides for the adaptation and modification of the existing laws to ensure that they will be in conformity with the Constitution. To achieve this it empowers the judge "to construe existing laws with the necessary adaptations and modifications to bring them into conformity with the Constitution". In **Director of Public Prosecutions v. Mollison No. 2** P.C. 88 of 2001 Lord Bingham stated the position thus at paragraph 10:

> "It seems clear that section 4 had two complementary objects: to ensure that existing laws did not cease to have force on the coming into effect of the new legal order; and to provide a means by which existing laws could be modified or adapted to ensure their conformity with the Constitution and preclude successful challenge on grounds of constitutional incompatibility."

It is significant to note that in **R v Hughes** and **Fox v The Queen** [2002 2 W.L.R. 1058 and 1077 Lord Rodger arrived at a similar conclusion with respect to the Constitutions of St. Lucia, and Saint Christopher and Nevis. Both Constitutions have one savings clause similar to Section 4(1) of the Order of the Jamaican Constitution and no equivalent to section 26(8). In construing the Criminal Code of St. Lucia and the Offences against the Person Act 1873 of Saint Christopher and Nevis, Lord Rodger said at 1080-1081 of **Fox v The Queen:**

> "11 Paragraph 2 (1) of Schedule 2 to the Order provides:
>
> "The existing laws shall, as from 19 September 1983, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order."
>
> Section 2 of the 1873 Act is inconsistent with section 7 of the Constitution only to the extent that it requires the court to sentence to death anyone convicted of murder. By contrast, a provision which simply authorized the imposition of the death penalty in the case of murder would be consistent with sections 4(1) and 7 of the Constitution. In exercise of the power under paragraph 2 (1) of Schedule 2 their Lordships accordingly construe section 2 of the 1873 Act as providing: Whosoever is convicted of murder may

> suffer death as a felon." The effect of this construction of section 2 is that, whenever anyone is convicted of murder, he may be sentenced to death or else he may be sentenced to a lesser punishment. The selection of the appropriate sentence will be a matter for the judge, having regard to all the circumstances of the case. Before sentence is imposed, the judge may be asked to hear submissions and, if appropriate, evidence relevant to the choice of sentence. Their Lordships refer to their fuller discussions of this matter in their judgment in **R v Hughes** [2002] 2 WLR 1058."

These decisions of the Privy Council from Jamaica, St. Lucia and Saint Christopher make it clear how the Offences against the Person Act 1864 and the Amendment of 1992 must be construed in this jurisdiction.

It is now appropriate to cite Sections 2 and 3(1) of the Offences against the Person Act 1864, a "law in force", to ascertain how it is to be construed after the appointed day August 6, 1962. Here are Sections 2 and 3:

> "2. Whosoever shall be convicted of murder shall suffer death as a felon.
>
> 3.-(1) Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice; and every person so convicted, shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners.
>
> Where by virtue of this subsection a person convicted of murder is sentenced to death, the form of the sentence shall be to the effect only that he is to ***"suffer death in the manner authorized by law."***

When the mandatory rule of construction in Section 4(1) of the Order is applied, sections 2 and 3 above it would read as follows:

> "2. Whosoever shall be convicted of murder **may** suffer death as a felon
>
> 3.-(1) Upon every conviction for murder the court **may** pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice; and every person so convicted, shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners.
>
> Where by virtue of this subsection a person convicted of murder is sentenced to death, the form of the sentence shall be to the effect only that he is to ***"suffer death in the manner authorized by law."***

This important phrase in italics obliges the Court to construe Section 3(1) so as to make this existing law conform with the Constitution. The effect is, that the principle of the separation of powers must be acknowledged to accord the judiciary the exclusive power to impose the sentence of death. Further, the effect of the phrase to "suffer death in the manner authorized by law" will be found in the provisions of Chapter 111 of the Constitution, which must now be given full force and effect. Be it noted that prior to the appointed day the phrase in italics probably meant "to be hanged by the neck until he is dead". Now these words are represented in Section 3 (1) by the words "and the same may be carried into execution as heretofore has been the practice". Once the Constitution became the supreme law then Chapter III of the Constitution prevailed. Those words must be adapted to conform to Chapter III generally and, in particular, to section 20. So construed the judicial power to impose a sentence of death is discretionary.

Accordingly, this law in force which has been adapted and modified by section 4 (1) of the Order is now governed by Chapter III of the Constitution. It must be held to be consistent with it, pursuant to section 26(8) and (9). So sections 14(1) 17(1) and 20(1) are now brought into play. The appellant has the protection of the law enshrined in Chapter III of the Constitution. The same result would be achieved by relying solely on section 26(8) of the Constitution by presuming that sections 2 and 3 of the 1864 Offences against the Person Act, though inconsistent with sections 14, 20 and 17 of the Constitution are, nevertheless, consistent with those sections with the result that the death penalty is discretionary. This important issue will be addressed later.

(b) **The Constitutional principle of the Separation of Powers**

As previously stated the principle of the separation of powers is envisaged in Section 4 (1) of the Order. The relevant part of the Order which came into operation on the appointed day and which was used to construe Sections 2 and 3 of the original Act reads as follows:

> "4(1) ...but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

The authorities which are responsible for applying the mandatory rule of construction to bring existing laws into conformity with the Constitution are the Supreme Court, the Court of Appeal and Her Majesty in Council. The

establishment of the Supreme Court and the Court of Appeal are to be found in Chapter VII of the Constitution. Also to be found in this Chapter are the appellate functions of Her Majesty in Council.

The cardinal point to note is that the principle of the separation of powers came into operation from the commencement of the Constitution. When the relevant Chapters of the Constitution are examined it will be seen that the specific functions of the three organs of government are expressly or impliedly stated. Why was the Constitution based on this principle? It is to preclude the concentration of power in a single organ of government, which is inimical to freedom. If powers of government are concentrated in one organ of government, then freedom goes, and in its place will be a government with absolute powers. Constitutional government on the other hand is limited government. Freedom flourishes in countries with constitutional government. Lord Bingham summarises the position thus in **Mollison No. 2** at paragraph 13:

> "Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies": **R (Anderson) v Secretary of State for the Home Department** [2002] 3 WLR 1800, at 1821-1822, paragraph 50. In the opinion of the Board, Mr Fitzgerald has made good his challenge to section 29 based on its incompatibility with the constitutional principle that judicial functions (such as

in respect of a criminal offence of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case-

(a) for the defence of any person from violence or for the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection or mutiny; or

(d) in order lawfully to prevent the commission by that person of a criminal offence,

or if he dies as the result of a lawful act of war."

These exceptions suggest that servants of the state and others may rely on them as defences to a charge of murder. The suggestion that Parliament could now stipulate the death penalty for offences other than murder does not seem tenable in this jurisdiction. This issue will be addressed later. The punishment for the offence of treason need not be determined in these proceedings, but it is questionable whether the sentence of death is permissible for this offence, let alone a mandatory sentence of death.

The importance of section 14 (1) which authorizes a sentence of death is that it emphasizes that it is the Court which must impose such a sentence on

persons. An enactment which provides for a mandatory sentence of death would deprive the Courts of their exclusive power to consider the specific circumstances of any person convicted of capital murder before imposing the sentence of death. There are further provisions in Sections 20 and 17 of the Constitution which relate to this issue which will require further consideration.

Mrs. Lawrence-Butler for the Crown, argued that the above analysis failed to take into account the provisions of section 26(8) and (9) which also deals with laws in force before the appointed day. These laws have also been described as existing laws in the side note to section 4 (1) of the Order. It is a serious submission and it was deployed with considerable skill. In order to determine the strength of this submission it is necessary to cite section 26(8) and (9) in Chapter 111 of the Constitution. It reads:

Interpretation of Chapter III

"26.-(1)...

(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.

(9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such a law by reason only of -

(a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council, 1962, or

> (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision."

Section 26(9) recognizes that initially the laws in force must be adapted and modified to conform to the Constitution pursuant to section 4(1) of the Order. When so adapted and modified a law is to be deemed a law in force rather than a new law. It would be different if there was an amendment with new provisions. Then it would be a new law, which would not be a law in force.

It is clear that if a law in force is inconsistent with the provisions of Chapter 111, but is not to be so held, then it can only be sustained by presuming it to be in conformity with the Constitution. This is a strong interpretive tool in the judicial armoury. It is stronger than "to adapt or modify". The only basis for saying such a law is saved is that it is brought in line with the Constitution. It is saved because it is not to be struck down as unconstitutional. The side note to section 26(8) speaks of the Interpretation of Chapter 111. This is an invitation to the Judiciary to interpret laws in force before the appointed day by presuming them to be in conformity with Chapter 111. This is the generous and purposive interpretation that ought to be accorded to Chapter III provisions.

This was the first time that Fundamental Rights and Freedoms were enshrined in the legal system as distinct from being a treaty obligation. The

European Convention of Human Rights as a treaty was applicable to Jamaica prior to Independence. This task of construction is entrusted to the Judiciary so as to give section 2 of the Constitution - the supremacy clause - full force and effect. Section 26(8) is confined to Chapter 111 and it is additional to section 4 (1) of the Order. It ensures the conformity of laws in force with the Supremacy Clause of the Constitution from the appointed day. The distinction is this, section 26(8) entrusts the judiciary with the task of ensuring that all laws in force are consistent with Chapter 111. Section 4(1) of the Order empowers all three organs of government to "adapt and modify" so as to bring existing laws into conformity with the Constitution. Section 26(8) has two functions and the above analysis refers to its first function. The second aspect is that it acts as an indemnity clause for acts done before the appointed day. Such acts cannot be challenged on the basis that they are unconstitutional.

It is in the light of this analysis that Lord Devlin relied on the presumption of constitutionality in the oft' quoted passage in **Director of Public Prosecutions v Nasralla** 1967 2 All E.R. 161. It was cited by Lord Diplock in **Baker v R.** (1973) 13 J.L.R. 169 at 177 thus:

> "This chapter [Chapter 111 of which section 26(8) forms part] ... proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter

> covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

Once the laws in force are presumed to be in accordance with the Constitution, then the laws in force relating to Chapter III are to be regarded as being in conformity with it.

Perhaps reference should be made to sections 13 and 25 of the Constitution and to their relationship to section 26(8). Section 13 of the Constitution runs thus:

> "13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and peaceful assembly and association; and
>
> (c) respect for the private and family life
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

This preamble is important. It states "every person in Jamaica is entitled to the fundamental rights and freedoms of the individual" on the

appointed day and thereafter because of "the subsequent provisions of this Chapter." For this to be so, the "laws in force" or the "existing laws" must be presumed to be consistent with Chapter III even if they are not. This is the logic of section 26(8). It is by presumption as a canon of construction that laws in force conform with Chapter III.

Section 25 reads:

Enforcement of protective provisions

"25.-(1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal."

For section 25 to be effective, the laws in force which are inconsistent with Chapter III must be presumed by a process of judicial interpretation to be

consistent with it. If any future law does not comply with the Constitution it will be null and void to the extent of the inconsistency. The remedies in Chapter III are not confined to proceedings invoked by way of section 25. They are also available in "any other action with respect to the same matter which is lawfully available" as by raising the point on appeal as the appellant has done in this instance. That is the reason for the proviso to section 25(2). Also to be noted is the use of the permissive **may** in section 25 in relation to the orders writs and directions the Supreme Court is empowered to make. These discretionary powers are applicable to a sentence of death or one of imprisonment for life.

Lord Devlin's gloss on section 26(8) was in circumstances where the special procedure in section 25 was invoked to enforce Nasralla's rights. The right sought to be protected is to be found in section 20(8) which reads:

> "(8) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence."

The common law on double jeopardy and pardon is consistent with section 20(8). This provision in relation to pardon must also be read in conjunction with section 90 of the Constitution where the prerogative power to

pardon after a trial is enshrined. This aspect of the prerogative will be addressed again when the Prerogative of Mercy is being examined.

What was propounded by Lord Devlin in construing section 26(8) was that even if the statute or common law in force was inconsistent with Chapter III of the Constitution, it was to be presumed to be consistent with it, so as to give force and effect to section 2, the supremacy clause. It is difficult to see how section 26(8) could save the mandatory death sentence, when all the Constitution authorized in sections 14 and 20 was a discretionary death sentence. What section 26(8) did was that it provided the means by which the mandatory sentence in the unamended Act was presumed to be discretionary. So **may** replaced **shall**. To that extent section 3 of the 1864 Act was saved.

Be it emphasised that sections 1-22 of the Order revoked the previous constitutional instruments, established the present Constitution and also made provisions for the adaptation and modification of the laws in force to conform with the Constitution. Also it contained other relevant matters as well as the transitional provisions so that the transfer of power was effected in an orderly manner.

Such prior adaptation and modification of laws in force would include the laws which were adapted and modified to conform with the principle of separation of powers which was applicable to the Constitution from the appointed day. When such a law was saved pursuant to section 4 of the Order, the exclusive power to sentence persons was entrusted to the

Judiciary. There can be no reliance on section 26(8) to save the mandatory death sentence. Rather it created a special regime which empowered the judiciary to presume the laws in force to be in conformity with Chapter III. It reinforces section 4(1) of the Order which ensures that the other Chapters of the Constitution are brought in line with the Constitution.

The above analysis of the twofold effect of section 26(8) of the Constitution is also applicable to laws pertaining to civil proceedings. The recent case of **Piper and Samuda** and **Pamela Benka-Coker v D.Y.C Fishing Ltd.** SCCA 35 of 2002 delivered 28th March 2003, is an illustration. This case adverts to the important case of **Neuman v Salmond** SCCA 39 of 2000 delivered 23rd June 2003.

The role of Parliament as regards a discretionary death sentence

It is necessary in accordance with the principle of separation of powers to examine the role of Parliament as adumbrated in Chapter X of the Constitution on the issue of the discretionary death sentence.

Section 48 of the Constitution reads:

> "48.-(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

Parliament cannot by ordinary legislation after the appointed day, enact a law to deprive the judiciary of the discretionary power stated in sections 14 and 20 to impose a death sentence on persons. It cannot deprive the judiciary of its independence which is enshrined in Chapter VII of the Constitution. It

is against this background that sections 2 and 3 of the Act before amendment was construed earlier in this judgment.

Sections 26 (8) and (9) of the Constitution has been stigmatized by some as containing grand-father clauses which have hindered the development of the Fundamental Rights and Freedoms enshrined in Chapter III as they relate to laws in force before the appointed day. They have failed to understand that sections 26(8) and (9) are to be construed to harmonise with the supremacy clause in section 2 of the Constitution. Such critics misunderstand the theory and working of the Constitution. They ignore the mandatory canons of construction to adapt and modify laws in force to conform with the Constitution. They ignore the presumption of constitutionality as a canon of construction and so fail to understand Lord Devlin's reliance on that canon in construing the laws in force in relation to Chapter III before the appointed day. They ignore the declaration in the preamble that "every person is entitled to the fundamental rights and freedoms" from the appointed day. For this to be effective the laws in force was among those in force who gave **Nasralla** a wider construction than was necessary for that decision.

They also ignore the fundamental principle of the separation of powers on which the Constitution is based. The common law method of interpretation is to develop the principles embodied in the constitutional instruments case by case when dealing with the laws in force before the appointed day. When this is done, it will be shown that from the very inception of the Constitution the

sentence of death pursuant to sections 14, 17, 20 and section 26(8) of the Constitution was discretionary not mandatory. I should add that both as counsel for the Crown and as a judge I had misunderstood the effect of section 26(8) of the Constitution on existing laws. It presumes existing laws to be in conformity with Chapter III. It is by resorting to section 26(8) that this is achieved. This excursion into constitutional history is a preparation to turn to the present position, since Parliament has now amended the Offences against the Person Act. Perhaps I should note that it was unnecessary to deal with constitutional history in detail in **Boxx** as I found, and still hold the view, that the Act was amended in 1992 by Parliament to create two different regimes for the offence of murder. Section 26(8) cannot apply to the Act as amended as this is a new law which was not in force on the appointed day. The alterations which are made to a law in force pursuant to section 26(9) are the only ones which permit a law enacted prior to the Constitution to be properly described as an existing law in relation to Chapter III.

The effect of the Amended Offences against the Person Act on the discretionary death sentence

Parliament amended the Offences against the Person Act, in order to reduce the number of offences which carried a discretionary death sentence as the maximum penalty. The first instance of such an amendment was the amendment to section 29 of the Juveniles Act to reverse the decision of **Baker v The Queen.** Then more extensive changes were provided for in the Act so

as to retain the death penalty for a restricted range of offences. This amendment was modelled on the 1957 Homicide Act U.K.

The first point to note is that the amendments had a prospective effect. Since they were subsequent to the appointed day, they were subject to the full force of the general limitations imposed on Parliament in section 48 of the Constitution and, in particular of the specific limitations in Chapter III of the Constitution. Foremost among these protections is the "protection of law" accorded to the appellant by section 20(1) of the Constitution. That protection affords the appellant "a fair hearing by an independent and impartial Court established by law". That Court is the Supreme Court established by section 97 of the Constitution. The right to a fair hearing, which includes a hearing before sentence is imposed, is a mandatory requirement. Each person who is convicted of capital murder may have mitigating circumstances which he is entitled to adduce before the Court in an effort to persuade the Court to impose some lesser sentence such as a sentence of life imprisonment. He may not succeed but his right to be heard at this stage is a valuable right afforded to him. It is natural justice writ large and it is deeply rooted in our laws. It defines us as a civilized society.

Further, as previously stated, the defendant has a right to life which is protected by section 14 of the Constitution. The only institution empowered to impose the sentence of death when there are no mitigating circumstances is the Court which will be "independent and impartial".

These features are being emphasized to demonstrate that the context in which the issues of separation of powers and Fundamental Rights and Freedoms arise is not just by virtue of an enactment of Parliament or a treaty. They arise in the context of constitutional provisions. So it is essential to point out that although the Human Rights Act is now a part of the legal system in the United Kingdom, it is so in the context of the unwritten Constitution of the United Kingdom. These principles can be abridged by the United Kingdom Parliament. Again while cases emanating from the European Court of Human Rights are instructive, they are not necessarily decided within the context of constitutions based on the Westminster model with Human Rights clauses operating within the context of the separation of powers.

Consequently, the European Court of Human Rights Court at Strasbourg with its confined jurisdiction, cannot be compared to the Supreme Court which has coercive powers to punish for contempt and to issue orders of attachment. Further, it has the executive arm of government to carry out its orders. So care must be exercised when relying on cases from the House of Lords or the Court of Human Rights. It goes without saying that citations from the High Court of Australia dealing with the construction of the Australian Constitution, or statutes which do not yet have Human Rights clauses, are of little assistance in solving the issues in this case. Nevertheless, be it noted that some valuable cases have emerged from that jurisdiction on the issue of separation of powers. The essential feature of Westminster Constitutions is that they are structured on

the principle of separation of powers and have entrenched provisions on Fundamental Rights and Freedoms.

The decisions of the Privy Council which construe fundamental rights clauses in Constitutions based on the Westminster model are of great relevance. It is against this background that section 17 and the remaining sub-sections of Section 20 must be addressed as they have a bearing on the discretionary death sentence.

It is helpful to set out section 17 which reads:

> "17.-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

There are two points to note. It is inhuman and degrading punishment for Parliament to enact legislation which precludes a convicted person from advancing evidence of mitigating circumstances. Such circumstances might provide a court empowered to impose a sentence of death with evidence which would warrant the imposition of a lesser sentence. Additionally, the death penalty is not only preserved by section 17(2)but specifically stated as permissible by section 14(1).

With respect to other relevant sub-sections of section 20 they read as follows:

"6) Every person who is charged with a criminal offence –

(a) ...
(b) shall be given adequate time and facilities for the preparation of his defence;

(c) shall be permitted to defend himself in person or by a legal representative of his own choice;

(d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution."

Section 20(7) is also relevant. It speaks of the "maximum penalty which might have been imposed for that offence at a time when it was committed".

These subsections also call into question a mandatory death sentence. If an accused is defending himself he must of necessity be entitled to state mitigating circumstances in an attempt to lessen the maximum sentence ordained by Parliament. He is also entitled to bring witnesses to support his own evidence in mitigation if he elects to give such evidence. On this analysis sections 20(6)and 20(7) support the contention that a mandatory death sentence is incompatible with section 20.

The relevant provision of the Act as amended reads in relation to the charge of capital murder as follows:

Capital murders. "2.-(1) Subject to subsection (2), murder committed in the following circumstances is capital murder,

that is to say –

...

(d) any murder committed by a person in the course or furtherance of –

(i) robbery;
(ii) burglary or housebreaking."

Then Section 3 (1) reads:

> "3.-(1) Every person who is convicted of capital murder shall be sentenced to death and upon every such conviction the court shall pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice; and every person so convicted or sentenced pursuant to subsection (1A), shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners.
>
> Where by virtue of this section a person is sentenced to death, the form of the sentence shall be to the effect only that he is to "suffer death in the manner authorized by law."

The words in quotation ***"to suffer death as authorized by law"*** point to Chapter III of the Constitution. The presumption of constitutionality ensures that the construction which must be followed is that which is provided for in Ssction 14(1), section 20 and section 17 of the Constitution. These sections ordain the manner in which a sentence of death must be imposed so "shall" becomes discretionary. Accordingly, sentence of death may only be imposed if the judge of the Supreme Court is not persuaded that any mitigating circumstances are adduced on behalf of the accused. So construed, the Act is in conformity with the Constitution.

It is now appropriate to summarise the position at this point. There is no doubt on the above analysis that on or after the appointed day, the new legal regime provided for a discretionary death sentence. This regime was brought into play once section 3 of the 1864 Offences against the Person Act was adapted and modified pursuant to section 4(1) of the Order. At that point, the principle of the separation of powers was applicable as well as Chapter III of the Constitution. This is how the **Director of Public Prosecutions v Kurt Mollison No. 2** P.C. Appeal No. 88 of 2001 ought to be understood. Once it was decided that a sentence in substance was determined by the executive, then the matter was at large and this Court (by a majority) imposed a discretionary life sentence with a recommendation that the appellant should not to be considered for parole until twenty years had elapsed. There was a cross appeal on this issue and the Privy Council allowed it. The reasons which are to be found in paragraphs 20 and 21 of the judgment of the Board read as follows:

> "20. ...A sentence of imprisonment for life is a sentence of a different nature from a sentence of indefinite detention specifically designed to address the special circumstances of those convicted of murders committed under the age of 18. Substitution of the court for the Governor-General should not lead to a change, and a change disadvantageous to the detainee, in the punishment imposed.
>
> 21. The Board did not understand the Director to resist this argument, to which there is, in the opinion of the Board, no answer. The cross-appeal therefore succeeds. The sentence of life imprisonment must be quashed and a sentence of detention during the

> court's pleasure substituted. It is not for the Board to prescribe how that sentence should be administered in order to give effect not only to the requirement that the offender be punished but also to the requirement that the offender's progress and development in custody be periodically reviewed so as to judge when, having regard to the safety of the public and also the welfare of the offender, release on licence may properly be ordered. The Director considered that a suitable regime could be devised without undue difficulty, and the Board shares his confidence."

This sentence of detention during the Court's pleasure is a rare sentence which may be described as a sentence fixed by law.

When the Act was amended in 1992, it provided for capital and non-capital murder at a time when all the provisions of the Constitution were in force. It is therefore untenable to seek to pray in aid section 26(8) on the ground that a mandatory death sentence was saved by that provision.

Are there binding authorities on this Court with respect to a discretionary death sentence?

In **Reyes v The Queen** [2002] 2 W.L.R. 1034 at p. 1045 Lord Bingham states the principles of constitutional interpretation thus:

> "... As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the

> light of evolving standards of decency that mark the progress of a maturing society."

Since the Constitution is the supreme law, the fact that there might be a majority who favour a mandatory sentence of death is not a factor to be considered in determining whether it is discretionary. The extent to which the Constitution protects minorities is entrusted to the judiciary. These minorities will include "bad men". Mr. Justice Holmes the eminent American jurist recognized this in an essay entitled **Law and the bad man**. Such a man is just as entitled to the protection of the law as is a model citizen. Fundamental Rights Provisions are meant to protect minorities and it is for the judiciary to interpret those rights in a generous manner. In restating this principle at page 1045 of **Reyes** Lord Bingham said:

> "... In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion, for reasons given by Chaskalson P in **S v Makwanyane** 1995 (3) SA 391, 431, para 88:
>
> "Public opinion may have some relevance to the inquiry, but, in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection or rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to referendum, in which a majority view would prevail over the wishes of any minority. The

> very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society."

It must be emphasized that on my analysis neither the 1864 Offences against the Person Act nor the 1992 amendment to that Act after being adapted and modified, or after applying the presumption of constitutionality, is inconsistent with the Constitution. As previously stated the canons of construction are to be found in 4(1) of the Order and section 26(8) of the Constitution. In **Reyes** the Criminal Code in Belize was found to be incompatible with the Constitution of that country. The ground on which it was decided that the Code was incompatible was section 7 of the Belizean Constitution, which corresponds to section 17 of the Jamaican Constitution.

Significantly however, section 6(2) of that Constitution cited at page 1039 of the judgment corresponds to section 20(1) of the Jamaica Constitution. So Lord Bingham states at page 1047 that:

> "... A law which denies a defendant the opportunity, after conviction, to seek to avoid imposition of the ultimate penalty, which he may not deserve, is incompatible with section 7 because it fails to respect his basic humanity."

It seems that here Lord Bingham is referring to the basic humanity of being afforded a fair hearing before sentence is imposed. Since the trial judge is independent and impartial he has a discretion to mitigate the sentence of

death. So considered, **Reyes v The Queen** is a binding authority in Jamaica as regards interpretation of the Constitution.

Since in the view of some, a mandatory life sentence is provided for non-capital murder in the Act then that will have to be examined so as to determine if it is consistent with section 20 of the Constitution as well as section 15 which states generally that it is the Court which is the competent authority to deprive a person of liberty. Once again valuable assistance may be found in **R v Smith (Edward Dewey)** 1987 I SCR 1045; **R v Offen** [2001] 1 W.L.R. 253 which are adverted to on pages 1052-1053 of **Reyes.** To my mind on a proper reading section 3A(1) and (2) of the Offences against the Person Act provides for a discretionary life sentence. The relevant sub-sections read:

> "3A(1) Subject to the provisions of this Act every person who is convicted of non-capital murder shall be sentenced to imprisonment for life."

This seeming mandatory provision is qualified by the proviso which demonstrates that the sentence of imprisonment for life is the maximum sentence. The proviso reads:

> "(2) Notwithstanding the provision of section 6 of the Parole Act, on sentencing any person convicted of non-capital murder to imprisonment for life, the Court may specify a period being longer than seven years, which that person should serve before becoming eligible for parole."

"Every person" in subsection (1) is to be contrasted with "any person" in sub-section (2). The wording of "any person" suggests that some persons may be

sentenced to a lesser sentence. Thus the sentence of imprisonment for life is discretionary.

In any event section 3A(1) and (2) must be read as consistent with the Supremacy Clause in section 2 of the Constitution. When the presumption of constitutionality is applied as a canon of construction 3A(1) and (2) must be read as discretionary to comply with sections 15 and 20 of the Constitution.

As for two cases which suggest that a mandatory death sentence is permissible, Lord Bingham in **Reyes** at page 1056 said:

> "45 Limited assistance is to be gained from such decisions of the Board as **Runyowa v The Queen** [1967] 1 AC 26 and **Ong Ah Chuan v Public Prosecutor** [1981] AC 648, made at a time when international jurisprudence on human rights was rudimentary and the Board found little assistance in such authority as there was."

I may add that when section 14 of the Jamaican Constitution is examined it seems that the sentence of death is confined to the offence of murder. It is questionable whether Parliament is empowered to enact legislation imposing a death sentence either for breaches of the Dangerous Drugs Act as in Singapore or for offences contrary to the Malicious Injuries to the Property Act as in Southern Rhodesia. Then again Lord Diplock's opinion in **Ong** contains some valuable passages of principle which support the unconstitutionality of a mandatory sentence of death. At page 672 he states the submissions thus:

> "...As their Lordships understood the argument presented to them on behalf of the defendants, it was

> that the mandatory nature of the sentence, in the case of an offence so broadly drawn as that of trafficking created by section 3 of the Drugs Act, rendered it arbitrary since it debarred the court in punishing offenders from discriminating between them according to their individual blameworthiness. This, it was contended, was arbitrary and not "in accordance with law" as their Lordships have construed that phrase in article 9(1):"

Section 9(1) of the Singapore Constitution at page 649 reads:

> "No person shall be deprived of life or personal liberty save in accordance with law."

Then Lord Diplock earlier construed at pages 670-671 the word "law" as it is to be understood in the Constitution:

> "In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such context as "in accordance with law," "equality before the law," "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by article 5) of articles 9(1) and 12 (1) would be little better than a mockery."

In the present case the contention of the appellant Peart is that a mandatory sentence of death runs counter to principles so ably stated by Lord Diplock. If that is correct the principles, though not the decision, favour the appellant.

One feature in the above passage is that it recognizes that Chapter III provisions must be an essential ingredient in any decision where the issue is the determination of Human Rights and it is clear that the provision corresponding to 20(1) of the Jamaican Constitution was breached. The appellant should have succeeded although the submission on his behalf stressed the equal protection clause in the Constitution as the basis for redress. That clause reads:

> "Art. 12 (1): All persons are equal before the law and entitled to the equal protection of the law."

As for **Runyowa v. Reginam** the following passage at page 643 contains the reasoning which would not be applicable to Jamaica:

> "... The provision contained in s. 60 of the Constitution enables the court to adjudicate whether some form or type or description of punishment, newly devised after the appointed day or not previously recognized, is inhuman or degrading, but it does not enable the court to declare an enactment imposing a punishment to be ultra vires on the ground that the court considers that the punishment laid down by the enactment is appropriate or excessive for the particular offence. Harsh though a law may be which compels the passing of a mandatory death sentence (and may so compel even where aiding and abetting or assisting is by acts which, though proximate to an offence, are relatively trivial) it can be remembered that there are provisions

> (e.g. s. 364 of the Criminal Procedure and Evidence Act in Southern Rhodesia) which ensure that further consideration is given to a case."

Section 60 of the Southern Rhodesia Constitution is set out at page 640 and reads:

> "(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

Presumably the Southern Rhodesia parliament was empowered "subject to the provisions of the Constitution" to make laws for the peace order and good government of that country. Section 60 was therefore justiciable and the courts were empowered to do just what they refused to do.

How the Prerogative of Mercy, an executive act, relates to a discretionary death sentence, a judicial act, having regard to the principle of the separation of powers and judicial review

There are two statements of law from the Privy Council which summarise the law on the Prerogative of Mercy. They are to be found in **Hinds v. The Queen** (1875) 13 J.L.R. 264 and **Reyes v. The Queen.** Paragraph 44 of **Reyes** reads as follows:

> "44. In reaching this decision the Board is mindful of the constitutional provisions, summarized above, governing the exercise of mercy by the Governor General. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function and the Advisory Council is not an independent and impartial court within the meaning of section 6(2) of the Constitution. Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and

> literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility. Appropriately, therefore, the provisions governing the Advisory Council appear in Part V of the Constitution, dealing with the executive. It has been repeatedly held that not only determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions."

The statement from **Hinds** at page 281 reads as follows:

> "The Royal Prerogative of Mercy, which has been exercised in Jamaica since it first became a territory of the British Crown, is expressly preserved by s.90 of the Constitution, which provides that it shall be exercised on Her Majesty's behalf by the Governor-General acting on the recommendation of the Privy Council. It is, as is recognized by its inclusion in Chapter VI of the Constitution, an executive power; but, as an executive power, it is exceptional and is confined, as it always has been since the Bill of Rights, to a power to remit in the case of a particular individual a punishment which has already been lawfully imposed upon him by a court – whether it be a punishment fixed by law for the offence of which he was found guilty or one determined by a judge in exercise of his judicial functions."

It ought to be anticipated that having regard to the powers of judicial review enshrined in Chapter III of the Jamaican Constitution there would be affirmation in the Constitution of the supervisory role of the Supreme Court to review the proceedings of tribunals and the executive arm of government. That power is enshrined in Chapter I, section 1(9) and reads as follows:

> "(9) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

It is important to recognize that these supervisory powers of the Supreme Court are meant to ensure that the Resident Magistrate's Courts, Courts of Petty Sessions, tribunals and the executive arm of government are confined to their jurisdiction. The Supreme Court in this context is not given an appellate role over tribunals or the executive. The supervisory role is limited to keeping tribunals or the executive within the powers accorded them by the common law or parliament. They are to be kept within their jurisdictions to ensure the supremacy of the rule of law.

The unfettered power to grant mercy after the court has exercised its discretion to impose a sentence of death, is known as the Prerogative of Mercy. The Courts are debarred from exercising powers of judicial review over this area of executive action by common law and this exclusion is enshrined in the Constitution by section 32(4). The definitions of the Prerogative of Mercy by Lord Diplock and Lord Bingham in **Hinds & Reyes** are in accordance with the Constitution, and it is now necessary to turn to the structure of the executive arm of government to examine how those powers are to be exercised in accordance with the Constitution.

Chapter IV sets out the power of the Governor-General. The specific powers pertinent to the exercise of the Prerogative of Mercy will no be adverted to.

Section 27 of the Constitution reads as follows:

> "27. There shall be a Governor-General of Jamaica who shall be appointed by Her Majesty and shall hold office during Her Majesty's pleasure and who shall be Her Majesty's representative in Jamaica."

Section 32(4) is very important in showing the circumstances when judicial review is excluded. It reads thus:

> "(4) Where the Governor-General is directed to exercise any function in accordance with the recommendation or advice of, or with the concurrence of, or after consultation with, or on the representation of, any person or authority, the question whether he has so exercised that function shall not be enquired into in any court."

It must be stated that section 1(9) which enshrines the supervisory role of the Supreme Court, is excluded by section 32(4) "Where the Governor-General is directed to exercise any function in accordance with the recommendation of any person or authority". The relevant phrase to consider is "the question whether he has so exercised that function shall not be questioned in any court." There is no appeal from the decision of the Governor-General in Privy Council. This body is not a Court. So the only way the Court could question the exercise of any function of the Governor-General after the appropriate recommendation is by judicial review. This is precluded

by section 32(4). That the power is unfettered may be gleaned from 32(2) which reads:

> "(2) Where the Governor-General is directed to exercise any function on the recommendation of any person or authority, he shall exercise that function in accordance with such recommendation:
>
> Provided that –
>
> (a) before he acts in accordance therewith, he may, in his discretion, once refer that recommendation back for reconsideration by the person or authority concerned; and
>
> (b) if that person or authority, having reconsidered the original recommendation under the preceding paragraph, substitutes therefor a different recommendation, the provisions of this subsection shall apply to that different recommendation as they apply to the original recommendation."

It is appropriate to turn to Chapter VI which bears the caption "Executive Powers". Section 68 reads:

Executive vested authority of Jamaica

> "68.-(1) The executive authority of Jamaica is vested in Her Majesty.
>
> (2) Subject to the provisions of this Constitution, the executive authority of Jamaica may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him
>
> (3) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the Governor-General."

Then Section 90(1) reads as follows:

> "90.-(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf –
>
> (a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions
>
> (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence.
>
> (c) substitute a less severe form of punishment for that imposed on any person for such an offence; or
>
> (d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence
>
> (2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council."

In addition to these powers which are enshrined in the Constitution, there is the power at common law to grant a pardon before trial. Any person can rely on this common law power by praying in aid section 20(8) (supra) of the Constitution. This power to pardon before trial must be contrasted with the powers of the Director of Public Prosecutions pursuant to 94(c) of the Constitution whereunder that officer is empowered to discontinue criminal

proceedings. It is clear that when section 90 is linked with section 32(4) the exclusion of judicial review is clear. Section 33 is also important. It reads:

> "33. The Governor-General shall keep and use the Board Seal for sealing all things whatsoever that shall pass under the said Seal."

The relevance of section 33, in this context, is that a death warrant is issued under the Board Seal when the Governor-General in Privy Council refuses a pardon in a capital case. It is an executive warrant not a judicial one in terms of section 32(4). Judicial review is therefore excluded. There must be an end to litigation. The importance of this will be recognized when section 91 of the Constitution is examined. This section reads thus:

Pardon in capital cases.

> "91.-(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.
>
> (2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion."

Be it noted that this is a special procedure applicable in capital murder cases. In addition to the judge's report which is usually forwarded as a matter

of course within a week after conviction to the Governor-General, he may require information from elsewhere. The usual course is that counsel for the prisoner furnishes such information through the petitioner. Otherwise, interested parties are also free to petition the Governor-General.

It is appropriate to take judicial notice that there is no shortage of interested parties to petition the Governor-General. The Human Rights organizations within the jurisdiction are skilful at organizing petitions and demonstrations on behalf of every condemned prisoner. On the international front Amnesty International deputed the German branch of that organization to organize petitions in favour of every prisoner sentenced to death. These groups are determined to abolish the death penalty. It ought to be acknowledged that it is partly due to the brilliant organizational and public relations skills of these organizations and the lawyers they have retained, often pro bono, why there has been no execution in this jurisdiction since 1988.

It should be emphasized that there will be the judge's reasons for imposing the death sentence. It is after reasons are reviewed by this Court and Her Majesty's Council, that the Privy Council may refuse to exercise its unfettered discretion to pardon. It is after that process that a death warrant is issued. Such a warrant is usually vetted by the Director of Public Prosecutions, an independent member of the executive.

There has been grave disquiet in this jurisdiction ever since the case of **Pratt** and **Morgan v. The Attorney-General** [1994] 2 A.C. 1 which decided

that if a prisoner is kept on death row for a period of five years, he is entitled to have a Court declare that his rights pursuant to Section 17 of the Constitution have been infringed, the appropriate relief being a sentence of life imprisonment. That case must be understood in the context of the facts on which it was decided. **Pratt** and **Morgan** were on death row for a period of some fourteen years.

Judicial Notice must also be taken of the fact that there are proposals to amend the Constitution to reverse the decision in **Pratt** and **Morgan.** Constitutional change is always a serious matter and requires great deliberation. Since the issue of a discretionary or mandatory death sentence must be settled in this jurisdiction by the Privy Council, it might be appropriate to await that decision before instituting amendments. In the meantime judicial decisions are not to be treated as statutes. It is open to interpret **Pratt** and **Morgan** as laying down the rule that five years on death row was a reasonable time in the circumstances of that case.

It also ought to be treated as a useful guideline, but not as an inflexible rule. Flexibility has always been the cardinal feature of the common law. **Pratt** and **Morgan** is not an exception to this salutary rule. If there are good reasons for an extension of time, the matter ought to be tested in the courts. This is the way the common law has always developed and adapted its principles to the facts of each case.

Another amendment proposed is to state that judicial review is impermissible with respect to the Prerogative of Mercy. That is the position pursuant to Section 32(4) of the Constitution, which enshrined the common law. It is also the necessary implication from Lord Bingham's judgment on **Reyes** cited earlier. **Boxx** also addressed the issue. Such an amendment would be superfluous.

The Governor-General is provided with a staff pursuant to Section 31 of the Constitution. Under a regime of a discretionary death sentence, it should be easy for the Governor-General's Secretary to warn the prisoner's representative of the time when the death warrant will be issued during the appeal from this Court to the Privy Council. After the Privy Council has considered the matter, if no pardon is granted, then the death warrant should be issued promptly so that the process can be completed within a five year period. I make these comments because the discretionary death sentence, although provided for since the appointed day, has never been administered in this jurisdiction.

Why has it taken forty years to acknowledge that a discretionary sentence was provided for in the Constitution ?

The sentence for the offence of murder was a mandatory death sentence. This was the position at common law and it was prescribed by statute before the appointed day. Apart from the restrictions imposed by the Colonial Laws Validity Act, Parliament before Independence had unrestricted powers over domestic legislation. Lawyers and the Judiciary were nurtured on the constitutional principle of sovereignty of Parliament. **Hinds** in 1975 was

the first time it was brought home, that Parliamentary powers to legislate were subject to the principle of the separation of powers. **Mollison No. 2** was the first time that the provision of Section 4(1) in the Order in Council was applied, although this Court in a series of judgments had pointed out the powers accorded to the judiciary to construe existing laws in accordance with the Constitution. Parliament in some instances responded by amending the laws in force. In **Michael Pringle v. The Queen** Privy Council Appeal 17 of 2002 paragraph 15 has brought to the fore the implications for legal aid provided for in section 20(6)(b) of the Constitution. Step by step the implications of the Constitution are being applied by the Courts.

So far as I am aware apart from **Mollison No. 2** in the Privy Council this is the first time that the implications of section 26(8) of the Constitution have been fully explored. It was not previously appreciated that Lord Devlin's sage words in **Nasralla** were uttered in the context of the existing common law which was in conformity with the Constitution. See **When is "An Existing Law" Saved** by Francis Alexis 1976 Public Law 256-282. But what if the existing law was not in such conformity as was the 1864 Offences against the Person Act which provided for a mandatory death sentence: or section 29(1) of the Juveniles Act where the executive instead of the Court deprived a person of liberty? The answer is that the law was presumed by section 26(8) of the Constitution to be in conformity with sections 14, 20 and 17 of the Constitution which provided for a discretionary death sentence. Or in the case of Juveniles

section 29(1) of that Act was presumed to be in conformity with section 15 (1) of the Constitution. The same result would be obtained by relying on section 4(1) of the Order in Council to adapt and modify existing laws bearing in mind the principle of the separation of powers which was applicable on the appointed day. Once this was done then Chapter III of the Constitution would have full force and effect.

To read the obiter dictum of Lord Devlin's speech in **Nasralla** as if it were a statute is to go far beyond the essential reasoning of the case. The error in failing to grasp the meaning of section 26(8) of the Constitution should not be made after **Mollison**. In paragraph 19 Lord Bingham said:

> "A modification which preserves the essential purpose of the challenged provision while achieving conformity with the Constitution is one that it would be legally desirable to make."

The significance of all of this is that section 4(1) of the Order and section 26(8) of the Constitution brings the laws in force in conformity with the Constitution from the appointed day whenever the laws in force are challenged in Court. The journey has just began and it is for the Lawyers and the Judiciary to lead the way. The journey would have commenced earlier if it was realized that the case of **Maloney Gordon v The Queen** (1969)13 W.I.R. 359 was correctly decided and reasoned.

As for the Act as amended, by relying on the presumption of constitutionality as explained earlier, the words to "suffer death in the manner authorized by law" point to the provisions of sections 14,17, and 20 of the

Constitution which provides for a discretionary death sentence. The amendment is a new law so section 26 (8) is not applicable. In putting forward this construction in relation to laws in force and Chapter III, I am mindful of Lord Bingham's references to section 26(8) in paragraphs 14, 18, and 19 of **Mollison No. 2.** Such a construction advanced by counsel for **Mollison** before the Board is not as "generous and purposive" as was proposed in **Reyes.** This is the guidance I have sought to follow in construing section 26(8). This important matter is still to be resolved by the Board.

The other influential factor has been the various International Covenants on Human Rights which have had an impact on democratic governments throughout the world. However, perhaps the most important factor has been the cases, **Reyes v. The Queen, Hughes v. The Queen and Fox v The Queen** in which the criminal codes of St. Lucia and Belize and the Offences against the Person Act from Saint Christopher and Nevis were examined. Upon such examination it was found that the codes and laws were in conflict with the Constitutions. In each case a discretionary death sentence was found to have been prescribed by the Constitution. This is the context in which the present case has been argued and decided.

Conclusion

To my mind the hearing ordered by this Court should be resumed in the light of our decision that the conviction is affirmed. The prisoner is entitled by virtue of section 20(1) of the Constitution to be heard in mitigation of the sentence of death, since his counsel was not astute enough to take the point in the Court below. Moreover, in his favour, there are binding authorities on this Court that the sentence of death is discretionary, namely the Privy Council cases of **Mollison No. 2** and **Reyes.** There are also the persuasive authorities of **Hughes** and **Fox.** Even more telling in his favour are sections 14, 20 and 17 of the Constitution and sections 2(1)(d) and 3(1) of the Act. It only remains for me to say how indebted I am to counsel on both sides for their interesting submissions.

BINGHAM, JA;

The appellant was tried and convicted in the Home Circuit Court before Wesley James J and a jury for capital murder contrary to section 2(I)(d) (i) of the Offences against the Person Act. He appealed against the conviction and sentence of death imposed upon him pursuant to section 3(I). No challenge was made to the sentence below neither was a Motion filed in the Constitutional Court seeking to question the validity of the sentence passed. Being mandatory in nature, the penalty of death for persons convicted of murder has always been a part of the judicial landscape of Jamaica and the role and function of Parliament as the body fixed with the authority to enact laws for the peace, order and good governance of the people of Jamaica": (section 48 (1) of the Jamaican Constitution, 1962).

Apart from an amending enactment, the Offences against the Person (Amendment) Act, 1992, which brought about a classification of persons convicted of the capital offence into two categories of capital and non capital offenders, the mandatory nature of the penalty of death, for persons charged with capital murder, or of life imprisonment for persons convicted of non-capital murder, has not been altered either in substance and effect.

Before us learned Counsel for the appellant sought to challenge his conviction by obtaining leave to argue five supplementary grounds of

appeal. Following the arguments of Counsel and before these were concluded learned Counsel for the appellant and the Crown were requested by the learned presiding judge to present further arguments touching on the constitutionality of the mandatory sentence of death to which the appellant was subject.

Following the hearing of the further arguments by Counsel and in a carefully worded judgment Smith J.A. has set out his reasons for his conclusion that the appeal ought to be dismissed and the conviction affirmed. This portion of his judgment was prepared from July, 2002 and it is the unanimous decision of the Court that the appeal be dismissed.

As the arguments on the constitutional question were concluded following the substantive submissions in respect of the challenge made against the conviction of the appellant, one may be left to wonder why it has taken close to eighteen months for a final decision to be reached in the matter. The reasons are not difficult to come by. The delay such as have taken place is the result of the final decision being overtaken by certain events which when examined will in my opinion render any decision made in this matter in relation to the arguments on the constitutional question otiose and a mere academic exercise.

Following upon the hearing of the instant appeal in two recent decisions this court has had the benefit of full arguments touching upon this very question raised in this Court on the constitutionality of the

mandatory death penalty. In both appeals the Court has pronounced on the constitutional issues vide ***R v Lambert Watson*** SCCA117/1999 delivered 16th December, 2002 and ***R v Dale Boxx*** SCCA 23/2000 delivered also on 16th December, 2002.

In ***Lambert Watson*** (supra) following the dismissal of his appeal, the constitutional question was raised for the first time before the Board of the Judicial Committee of the Privy Council. The matter of the mandatory death sentence was remitted to this Court (Forte P, Panton JA and Clarke JA (Ag.) for the constitutional issue to be argued. Following submissions by counsel, the Court, in closely reasoned judgments, held that the mandatory sentence of death was saved from being held unconstitutional by virtue of section 26(8) of the Constitution and also by section 4(1) of the Jamaica (Constitution) Order in Council 1962. A similar decision was reached by the majority in ***R v Dale Boxx*** (supra): Downer JA (dissenting), Panton JA and Clarke JA (Ag.)

In the case of ***Lambert Watson*** (supra) the Court in coming to its decision was of the view:

(i) that the mandatory sentence of death was fixed by the Legislature in a law that was in existence before the Constitution came into force;

(ii) that the provision of section 3 of the Offences against the Person Act (as amended) for mandatory sentence of death in

respect of Capital Murder as defined by section 2 is not "sufficiently discriminating to obviate inhumanity in its operation." It is therefore incompatible with s.17(1) of the Constitution;

(iii) however, the provision of section 3 for mandatory death sentence is saved by section 26(8) of the Constitution.

In the latter case Downer JA (dissenting) was of the view that:

(i) All mandatory sentences offend against the Constitution.

(ii) Section 3 of the Offences against the Person Act as amended was enacted after 1962 (the coming into force of the Constitution) and therefore section 26 (8) does not apply.

(iii) Section 3 as amended provides for a discretionary death sentence and is therefore not incompatible with section 17(1) and s. 20(1) of the Constitution or with the constitutional principle of the Separation of Powers.

For my own part I am content to follow the reasoning adopted by the court in ***Lambert Watson*** (supra) and the majority in ***Dale Boxx*** (supra). The views expressed therein accord with my own. Both decisions draw support from the judgments of the Board of the Privy Council in ***Director of Public Prosecutions v Nasralla*** [1967] 2 A.C. 238 per the dictum of Lord Devlin at pp. 247-248 and that of Lord Diplock in ***Hinds v The Queen*** [1977] A.C. 195,226(f) and 227(f).

Lambert Watson (supra) has appealed to the Judicial Committee of the Privy Council from the decision of this Court. The outcome of the appeal will not be known until some time in the new year. In the interim there is need for closure to be made in respect of this matter.

For the reasons set out, I would therefore dismiss the appeal and affirm the conviction and sentence of death passed on the appellant.

SMITH, J.A.:

The appellant was convicted of capital murder on the 10th July, 2000 before Wesley James, J and a jury in the Home Circuit Court. The particulars of the offence were that he on the 14th day of May, 1999, in the parish of St. Andrew murdered Delroy Parchment in the course or furtherance of a robbery. The death sentence was imposed on him. At this stage I will encapsulate the Crown's case against the appellant and his defence thereto and later when dealing with the complaints made, refer to the relevant evidence in detail.

The deceased Delroy Parchment was a security guard employed by Mr. Frank Cox, the Managing Director of DYC Fishing complex located at 3 Brentford Road, Cross Roads. On the 14th May, 1999, the deceased was issued a Taurus firearm in the course of his duty.

The principal witness for the prosecution was Miss Claudette Newell. In her evidence Miss Newell said that on the 14th May, 1999, about 7:00

p.m. she saw Shabadine Peart (the appellant), Joycie Boy, Dennis and a tall man in her yard. Each had a gun in his hand. She heard the appellant whom she knew for about two (2) years before, say to the others "we are going for a security guard up by Curphey Place Road to kill him for his gun". She heard Joycie Boy say in reply "come no man before it is too late."

The appellant and Joycie Boy left the yard on a motor bike about 7:30 p.m. Joycie Boy was the driver and the appellant rode on the pillion. They had their guns. They returned some 15-20 minutes later. They parked the bike in the yard. The appellant said to Dennis and Joycie Boy "dem two shots weh me give the security boy me sure him can't live". The appellant removed two hand guns from his waist. He held up one and said, "this is the gun that we took from the security". Joycie Boy said, "me have a feeling that the boy no dead". The appellant started to laugh. He went towards Miss Newell and said, "mummy, you done know how dem things yah go". He replaced the gun in his waist and said to Dennis "me have to show the boss weh me tek from the security".

Miss Newell's evidence is supported by that of Mr. Peter Alvaranga a witness who could not be found and whose statement was read to the jury. In his statement Mr. Alvaranga said on the 14th May, 1999 at about 7:30 p.m. he was sitting in front of the main gate at DYC Fishing Company ("DYC") when he heard two explosions coming from the direction of

Curphey Road. He ran towards Curphey Road. As he ran he heard a motor bike "start up" shortly after, the motor bike with the two men passed him. He heard one say "mi bun the bwoy". He then saw Delroy Parchment a security guard whom he knew before on the ground bleeding and gasping for breath. He took up Delroy's adidas bag and threw it under the gate at DYC. He proceeded to the Cross Roads Police Station and made a report. Mr. Clifton Towsend, a security guard and a co-worker of the deceased told the Court that on the 14th May, 1999 he was at the DYC Fishing Complex. He was in the guard house lying on his back. About 7:45 p.m. he heard "couple shots burst outside". The sounds came from the direction of Brentford or Curphey Road. He did not get up. About fifteen minutes after he heard knocking on the gate he got up. It was Mr. Peter Alvaranga whom he knew before. He said that Alvaranga used to work at DYC Fishing. Alvaranga threw a black bag underneath the gate and told him something. He recognized the bag as that of the deceased Parchment.

Detective Inspector Osmond Wright told the court that between 7:30 p.m. and 8:00 p.m. on the 14th May, 1999 he was at Cross Roads Police station when he received a report. He went to Curphey Road which joins Slipe Road and Brentford Road. There he saw the body of the deceased lying on its back in a pool of blood.

On the 15th May, 1999, Miss Claudette Newell pointed out the appellant to Detective Sgt. Hall who arrested him and escorted him to the Admiral Town Police Station.

On the 18th May, 1999, Detective Inspector Wright charged the appellant with the murder of the deceased. He cautioned the appellant who said " a mi woman house me did deh when dat happen".

On the 19th May, 1999, the appellant was taken to the CIB office at the Cross Roads Police Station where he was questioned by Inspector Wright. He was asked sixty three (63) questions – the questions and answers were recorded. The document containing these questions and answers were tendered in evidence.

The appellant's defence was an alibi. In his evidence he gave details of his activities and his whereabouts on the 14th May, 1999. He insisted that he did not shoot the deceased. He swore that he was at his girlfriend Debbie's home at the material time. He told the court that he knew "Joycie Boy" Dennis and Claudette Newell whom he knew as "Tuffy". Tuffy he said wanted to have an intimate relationship with him. He declined her overtures. She became, he said physically aggressive. He hit her in the face with his fist to keep her off. Later a police vehicle came on the scene. He saw Tuffy point at him and he was consequently arrested by the police and taken to the station.

He further testified that on the 19th of May, the police beat and threatened him and thereby forced him to answer sixty three (63) questions and to sign the document containing the questions and answers. He called three witnesses -- his girlfriend Christine Hibbert otherwise called "Debbie," Miss Nadine Cousins and Mr. Victor Howard alias Harry.

Five supplemental grounds of appeal were filed and one further supplemental ground. Counsel for the appellant was granted leave to argue these six (6) grounds.

Ground 1

The first ground concerns the reception in evidence of the statement of Mr. Peter Alvaranga. It is the contention of Mr. Hines that the learned trial judge erred when he ruled that the statement was admissible because all reasonable steps were not taken to find him. He relied on ***R v Michael Barrett*** SCCA no. 76/97 delivered on 31st July 1998. Mrs. Lawrence Butler on the other hand submitted that in the ***Michael Barrett's*** case the Crown relied on one witness. Whereas in the instant case the Crown relied on circumstantial evidence. The Crown, she contended is not relying on the evidence of Alvaranga to link the appellant to the offence. Alvaranga's evidence is only a part of the circumstantial evidence, she argued.

The statement of Alvaranga was admitted into evidence pursuant to section 31D (d) of the Evidence Act, as amended which reads:

> "Subject to section G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –
>
> (a) – (c) ...
>
> (d) cannot be found after all reasonable steps have been taken to find him; or
>
> (e) ..."

The issue raised by this ground is whether or not the evidence before the Court was sufficiently cogent to satisfy the judge that all reasonable steps were taken to find Alvaranga.

The evidence on which the Crown relied in this regard came from Detective Inspector Wright, Constable Leighton Bucknor and Mr. Frank Cox the former employer of Mr. Alvaranga. Inspector Wright testified that on the night of the murder about 9:30 p.m., Mr. Peter Alvaranga gave him a written statement. He saw Mr. Alvaranga sign and date the statement. He had not seen Mr. Alvaranga since that night. He had no fixed address. He made enquiries to track him down with a view to his giving evidence at the preliminary enquiry. He visited certain addresses given to him on many occasions. He enlisted the assistance of Constable Bucknor and District Constable Dixon from the Cross Roads Police

Station. Subsequently, when the matter came up for trial, he visited the areas where Mr. Alvaranga was often seen and where he worked. He made enquiries of a number of persons in an attempt to locate him.

He contacted a number of institutions such as the District Prison, St. Catherine, the General Penetentiary, the Bellevue Hospital, the Chest Hospital, the Mona Rehabilitation Centre, the University of the West Indies Hospital, the Registrar General's Department, Maddens Funeral Parlour, the Remand Centre and the Gun Court lock ups, Police Control among others. During the week of the trial he revisited the Brentford Road area. He again enlisted the help of Constable Bucknor who had over fourteen (14) years service in the area where Mr. Alvaranga stayed and worked. On the day before he gave evidence the Inspector went to Old Harbour in St. Catherine and made enquiries of persons who knew Mr. Alvaranga very well. He received from them an address in Chedwin Park where Mr. Alvaranga's mother and brother used to live. He visited that address. They had removed; he spoke to several persons there who also knew Mr. Alvaranga. All these efforts were to no avail.

Constable Bucknor was stationed at Cross Roads Police station for over ten (10) years. He knew Peter Alvaranga for about four (4) years before the murder. He spoke to him on the night of the murder at the scene of the murder. He had gone there and had seen him there. He used to see and speak to Mr. Alvaranga on Brentford Road before the

day of the murder, that was at the gate of DYC Fishing Complex. He also used to see Alvaranga in a caravan in the Brentford Road area. Since the night of the murder he had not seen him. He made several visits to the area where he knew Alvaranga used to "hang out" but did not see him. Up to the morning of the day he gave evidence, he went in search of Mr. Alvaranga. He spoke to Alvaranga's friends who frequented the area and none of them had seen him or heard from him. He spoke to Alvaranga's brother but that was also to no avail.

Mr. Frank Cox, the last known employer of Mr. Alvaranga, told the Court that Alvaranga was a caretaker at his business place. As caretaker he used to sleep on the premises. In March, 1999, Mr. Cox terminated the employment of Mr. Alvaranga. After March, 1999, Mr. Alvaranga sold "sky juice" from a cart on Brentford Road. He used to see him every day up to the 14th May, 1999, the date of the murder. After the murder he saw him around for about two weeks and "then he disappeared". He had not seen him since.

On the basis of this evidence the learned trial judge was satisfied that the witness could not be found after all reasonable steps had been taken to find him.

It is my view that the fact that in this country some witnesses are afraid to testify in court because of threats of bodily harm to themselves

and their relatives is a factor that a judge is entitled to take into consideration when deciding whether all reasonable steps were taken to locate a witness. So also the judge may take into consideration the fact that witnesses in murder cases are known to have been killed for having given statements to the police. In the instant case, it cannot properly be said that the evidence of the efforts made to find the witness is perfunctory, slight and not thorough as was said of the evidence in ***R v Michael Barrett*** (supra).

The efforts made in this case are almost similar to those made in ***R v Barry Wizzard*** SCCA No. 14/2000 delivered April 6, 2001 where the decision of the trial judge to admit the statement of a missing witness was upheld. The question as to whether or not all reasonable steps have been taken will depend on the facts and circumstances of each case. In the instant case the Crown relied on circumstantial evidence. The evidence of the missing witness was only one of the many strands on which the Crown relied. I am clearly of the view that the evidence before the Court was sufficiently cogent to satisfy the judge that all reasonable steps were taken to find Mr. Alvaranga. This ground therefore fails.

Ground 2

In this ground counsel for the appellant complains that the learned trial judge erred in admitting evidence of an alleged assault on the main prosecution witness by the appellant thereby denying him a fair trial. Alternatively counsel submitted that the learned trial judge "should have eliminated evidence of this matter (the assault) from the consideration of the jury."

The evidence of the assault came from Miss Claudette Newell and Detective Sgt. George Hall. Miss Newell's evidence was that she went to the police station and made a report. She returned home about 10:00 p.m. As she reached the gate she heard a male voice call her name. She stood at the gate and saw some persons approaching her. When they came up to her she recognised the appellant and Joycie Boy. They were in the company of the "tall man" whom she had seen before. Shabadine said to her "Me hear say you go call up mi boss name a station". The tall man asked, " a come you come fi argue or a come you come fi beat or kill her?" Then they started to beat her. A man who lived in the same premises intervened and asked why they were beating her. Shabadine said, "the gal a informer". The witness then described how she "dragged" herself into the yard and into her room and closed the door. Thereafter Dennis entreated her to open the door. When she

opened the door she saw the appellant, Joycie Boy and Dennis. The appellant, she said, entered and hit her in the head with a gun. She fell and held unto the bed. The appellant tried to pull her out of the room. He asked the others to help and at that time she heard a voice say "Police!" She told the court that the appellant gave one of his cohorts the gun and the latter left the premises through the back fence.

Ultimately she pointed out the appellant to the police who held him. The police took the appellant as well as the witness to the police Station. Sgt. Hall said her face was swollen. Counsel for the appellant is contending that evidence of the assault should not have been led in the trial of the appellant for murder. It was entirely irrelevant and gravely prejudicial he said.

Mrs. Lawrence-Butler for the Crown submitted that the assault was "in the natural course of events". It (the assault), she argued, gave the circumstances of the arrest of the appellant. She further submitted that even if the evidence of the assault was wrongly admitted the error was corrected by the leaned trial judge when he told the jury to disabuse their minds of the fact of the assault.

In order to consider this ground in its proper perspective it is necessary in my opinion to recapitulate the appellant's evidence as it affects the main witness of the prosecution. He knew this witness well. He

called her "Tuffy". She wanted to have an intimate relationship with him. He spurned her amorous or, rather erotic advances. According to his account her love having been disprized, she became furious and resorted to a physical attack on the appellant. He punched her in the face to subdue her. It is clear that the appellant was giving a reason for "Tuffy's" evidence which implicated him in the murder. She was saying what she said because he had rebuffed her. He was attacking her credibility. The witness' evidence as to how and why she came by the injuries was clearly relevant to the issue of the witness' credibility. So too was Sgt. Hall's evidence.

The witness had also testified that the appellant after displaying the gun replaced it in his waist and said to Dennis "me have fe show the boss weh me tek from the security". It is my view that the witness' later evidence that just as she returned from the police station the appellant accosted her with the words "me hearsay you go call up me boss name a station" and thereafter proceeded to gun-butt and otherwise physically assault her tends to confirm the reliability of her evidence as to what had taken place earlier. I therefore hold that the subsequent conduct of the appellant was relevant and admissible in the circumstances.

As a general rule of practice a trial judge has, in a criminal trial, a discretion to refuse to admit evidence if in his opinion its prejudicial effect

outweighs its probative value - ***R v Sang*** [1980] A.C. 402 at 431. The Court is concerned to afford the accused a fair trial. The Court will protect the accused by the exclusion from his trial of evidence which might have an unreliable effect upon his trial.

I am not persuaded that the prejudicial effect of the assault outweighed its probative value. Such prejudicial effect that might have been present was neutralized by the learned trial judge when he directed the jury as follows (pps. 975-6):

> " The evidence you have heard is that there was an assault on Miss Newell by the accused. Now that assault is not an issue that you must use to come to any conclusion, how the accused behave. It has to go to Miss Newell's credit worthiness and remember I said to you that when this Sergeant from Half Way Tree came there, he said he found her under a bed and that her face was swollen. Now having said all that, I must ask you not to use any act of assault which you may find that the accused used against Miss Newell as evidence used adversely against him to come to any finding in this court of murder. I hope I have made it clear. That is, do not use any evidence of an assault against Miss Newell adversely against the accused to say, well these are persons apt to use violence in a certain situation. It is to bring to your attention the credit worthiness of Miss Newell. That is, if you believe the Sgt. who said he saw her face swollen and she was traumatised.
>
> Disabuse your mind of the assault in trying to come to your verdict on this case and your verdict on the indictment".

I think the learned trial judge went overboard in his effort to secure a fair trial for the appellant. I am satisfied that there was no risk of a miscarriage of justice. This ground therefore fails.

Ground 3

The complaint in this ground is that the learned trial judge erred in that he failed to direct the jury that there was evidence pointing to the fact that the murder could have taken place before 7:30 p.m. when the main prosecution witness, Miss Newell, said that the appellant rode off.

Miss Newell testified that the appellant left Ivy Road at "about 7:30 p.m. going up to 8:00. It's about 7:30" – see p. 31 of the record. Mr. Alvaranga in his statement said at about 7:30 p.m. he heard two explosions and shortly after saw two men leaving the scene on a bike. He heard one say " mi bun the boy". Mr. Clifton Towsend, the security guard said about 7:45 p.m. he heard "couple shots burst outside."

Mr. Cox in examination – in – chief said he was handed the bag around 7:00. However, under cross-examination he put the time at 7:00 to 7:30 p.m. Mr. Cox said he was confused as to the time and no doubt he was. It is quite clear Mr. Cox was mistaken when he said he got the bag at 7:00 p.m. At p. 884 of the record the learned trial judge told the jury that "... timing is of importance in this case you will have to use your intelligence and the commonsense that each of you have gained..."

The learned judge reminded the jury of the evidence of the various witnesses and left it to them to decide what evidence they will accept or reject. I do not agree with counsel for the appellant that the judge "eliminated from the jury's consideration the possibility that the murder could have taken place one half of an hour or more before the appellant rode off from Ivy Road." The prosecution's case was founded on a combination of circumstances no one of which would be sufficient to sustain the charge, but taken together may create a conclusion of guilt beyond reasonable doubt. I am firmly of the view that in the circumstances of this case the criticism is unsustainable.

Ground 4 – Alibi

In this ground Mr. Hines complains that the judge failed to give the ***Turnbull*** – false alibi – warning. Counsel for the appellant submitted that the judge having pointed out the discrepancy between the appellant and his witness, there was a distinct possibility that the jury would conclude that the alibi was false. Consequently he agreed, there was a real risk that the jury might have concluded that a rejection of the alibi must support the identification evidence. Mr. Hines relied on ***R v Gavaska Brown et al*** SCCA 84, 85, 86/1999 and ***R v Pemberton*** [1994] 99 Cr. App. R 228. Mrs Lawrence – Butler, counsel for the Crown, submitted that in this case, unlike the ***Gavaska Brown*** case, the prosecution is relying

on circumstantial evidence to connect the appellant to the offence. In this case, she submitted no one claimed to have seen the appellant shoot the deceased or to have seen him on the scene of the crime.

The direction given by the learned trial judge is correct and adequate, she argued. She relied on ***R v Harron*** [1996] Crim. L.R. 581 and ***Alfred Flowers v The Queen*** Privy Council Appeal No. 54 /1999.

The learned judge gave the jury the following directions (pps.964-5):

> "The accused man has raised the defence called alibi but none of his witnesses can support him and did support him as to where he was at the crucial time, somewhere between 7:00 and 8:00. He gave some answers which would suggest that he was with Debbie that time, but Debbie's evidence is that she got home 8:30 and saw him watching television.
>
> He said to the police he was with Debbie, where the police found him sometime later that night, from 7:00 to 8:00 but that too can't be true and you may well so-find".

At the end of his summing-up on the invitation of prosecuting counsel the trial judge revisited the issue of alibi thus (p.972):

> "Mr. Foreman and members of the jury, I know I have touched on alibi, and I did say in part in relation to the other evidence, that even if you do not believe all of what the accused man and his witnesses are saying, you cannot convict him, you have to be satisfied to the extent that you feel sure on the evidence of the prosecution witnesses. Now, when it comes to the alibi, alibi is a word used in legal jargon to say that the person, the accused man was somewhere else,

> and I did say that none of his witnesses were able to support him on that issue. But having said that I must also tell you that he has no duty to prove where he was on the evening of the 14th May. It is the prosecution's duty to satisfy you to the extent that you feel sure that he was ... at 2 Lower Ivy Road as Claudette Newell said, and that some minutes later he had gone out and come back and was there, and I said to you that no person can be in two places at the same time, so it is a matter for you who you believe. So that if you are not sure whether you can believe Claudette Newell on the issue of where this man was or you are not sure whether you can believe that it was he who she saw making that arrangement to go and kill then you would have to acquit him".

I agree with Crown Counsel that these directions of the learned trial judge were in the circumstances of this case adequate. The central issue in the case was whether Miss Newell was lying or whether the appellant was. The truthfulness of Miss Newell was crucial to the prosecution's case. The judge had directed the jury that if they rejected the appellant's evidence that he was with his girlfriend at the time of the offence before they could convict him they had to be sure that Miss Newell was right when she said she saw him at Lower Ivy Road and was speaking the truth as to what she heard him say and saw him do. The prosecution were not asking the jury to take the false alibi, if they so find, as proof of guilt. They were certainly asking that the alibi defence be rejected, but not that the rejection be treated as proof positive of guilt.

Also the judge in his summing up did not suggest to the jury that a false alibi may be proof of guilt. In ***R v Harron*** (supra) it was argued on appeal that there was a material omission in the judge's summing up in that he failed to direct the jury that if they rejected the alibi evidence they should not conclude from such rejection that H must be guilty. He should have told them to consider why the alibi had been fabricated if that was their conclusion, warning that alibis were fabricated for other reasons than attempting to cover up guilt and the fact that He had lied about where he was did not prove he was where the Crown said he was. In dismissing the appeal the Court of Appeal Criminal Division held that although the judge did not give the false alibi warning direction he had adequately conveyed to the jury that even if they concluded that the alibi was false that did not itself entitle them to convict the defendant. The Crown must still make them sure of his guilt. The Court was of the view that the **Turnbull** –false alibi – warning direction should not be given unless there is a clear need for it, otherwise it may do more harm than good. Such a need generally arises only where the prosecution are trying to make the point that a lie proves something in the case, as distinct from simply asking the jury to believe their witness or where the judge suggests that a false alibi may be treated as proof of guilt.

In ***Alfred Flowers v The Queen*** (supra) their Lordships did not accept the submission that the conviction was unsafe because of the failure to give a detailed direction on the significance of lies or in respect of false alibi evidence. Their Lordships were of the view that the issue of lies or false alibi was not a separate issue but was implicit in other issues. In the present case, there was no real risk, in my view that the jury might have concluded from the mere rejection of the alibi evidence that the appellant was guilty. This ground also fails.

Ground 5

In this ground Mr. Hines complained that the learned judge erred in admitting into evidence the questions and answers which he contended were obtained in breach of the Judges' Rules. Counsel also contended that the appellant was questioned after he was charged in breach of Rules 1 and 3(b). Further counsel submitted that no effort was made to secure the services of an attorney-at-law for the appellant.

A **voir dire** was held in the absence of the jury to determine the admissibility of the questions and answers. After hearing submissions the judge held that the answers to the questions were voluntarily made. The learned judge was mindful, that he had a discretion to exclude the evidence but decided not to exercise his discretion to exclude it.

The evidence relevant to this ground is to the following effect. On the 18th May, 1999, Detective Inspector Wright saw the appellant in custody at the Cross Police Station. He arrested and charged him for the murder of Delroy Parchment. He cautioned the appellant who, according to the Inspector said " a mi woman house mi deh when dat happen".

On the 19th May, 1999, Inspector Wright told the appellant that he intended to ask him a number of questions in relation to the murder of Delroy Parchment. The appellant's answers to sixty three (63) questions were recorded.

During the **voir dire** it was suggested that the appellant was beaten, threatened and forced to answer the questions and to sign the documents containing the questions and answers. It was also suggested that the appellant told Inspector Wright that he wanted the services of an attorney-at-law and was denied access to legal advice. In his evidence during the **voir dire** the appellant described the beating and the oppressive conduct of the police .

It is clear that the test of admissibility of a statement is whether it is a voluntary statement. Rule 3(b) of the Judges Rules provides that only in exceptional cases that questions relating to the offence should be put to the accused person after he had been charged. There can be no doubt that some of the questions asked relate to the offence for which

the appellant was charged. However, Inspector Wright gave as his reason for asking the appellant questions relating to the offence after he was charged, the fact that he was aware that another man, "Joycie Boy" who was still at large was involved in the murder of Delroy Parchment. Further the evidence indicates that "Pie Q" to whom some of the questions refer was an "area-don" and that the appellant was under his command. It was the duty, I think, of the police to try to elicit from the appellant information that may assist them in search for a possible link between the "don" and the offence. I am of the view that there were indeed exceptional circumstances to justify the police questioning the appellant in the way they did after he was charged. However, even if the circumstances were not exceptional the judge's discretion to admit the statement in the interest of justice should not be disturbed. The Judges' Rules are not rules of law but rules of practice for the guidance of the police. A statement made not in accordance with the Rules, is not in law inadmissible if it is a voluntary statement. However, the court may in the exercise of its discretion refuse to admit a statement if the court finds that it was made in breach of the rules.

The learned judge after hearing full submissions from counsel ruled in favour of admitting the document containing the questions and answers. The document does not contain a confession. In fact most

of the answers were innocuous. Some of the questions relate to another man. It is fair to say that the relevance of the statements to the prosecution is only in so far as they are inconsistent with the defence evidence.

In my view it cannot be said that the learned judge acted unreasonably in deciding to admit the questions and answers. There was no miscarriage of justice arising from the technical breach of Rule 3 of the Judge's Rules.

Ground 6

This ground raises the issue of the constitutionality of a mandatory death sentence. The Offences against the Person Act was amended in 1992 in order to create two categories of murder – capital and non-capital. Hitherto the punishment for all types of murder was death. Since 1992 the death penalty is only imposed on persons convicted of capital murder. Persons convicted of non-capital murder are sentenced to life imprisonment.

In two recent decisions this Court has pronounced on the constitutional validity of the mandatory death penalty. In **R v. Lambert Watson** SCCA 117/1999 delivered 16th December, 2002 the Court [Forte P, Panton JA and Clarke JA (Ag.)] held that the mandatory sentence of death was saved from being held unconstitutional by virtue of s.26(8) of the Constitution and probably by s.4(1) of The Jamaica

(Constitution) Order in Council 1962. In the other case ***R v Dale Boxx*** SCCA 123/ 2000 delivered 16th December, 2002 (the Court by a majority [(Downer J.A (dissenting), Panton, J.A. and Clarke J.A. (Ag.) followed the decision in ***Watson***.

In the former case the Court held:

(i) The mandatory death penalty was fixed by the Legislature in a Law that was in existence before the Constitution came into force.

(ii) The provision of section 3 of the Offences against the Person Act (as amended) for mandatory sentence of death in respect of capital murder as defined by section 2 is not "sufficiently discriminating to obviate inhumanity in its operation". It is therefore incompatible with s.17 (1) of the Constitution.

(iii) However, the provision of section 3 for mandatory death sentence is saved by s.26(8) of the Constitution.

In the latter case Downer J.A. (dissentiente) was of the view that:

(i) All mandatory sentences offend against the Constitution.

(ii) Section 3 of the Offences against the Person Act was enacted after 1962 (the coming into force of the Constitution) and therefore s.26 (8) does not apply.

(iii) In any event, s.3 provides for a discretionary death sentence and is therefore not incompatible with s.17(1) and s.20(1) of the Constitution or with the constitutional principle of the Separation of Powers.

Lambert Watson has appealed to the Judicial Committee of the Privy Council. I am awaiting the outcome of that appeal but it does not now seem likely that that will be soon forthcoming, hence the decision not to further delay this judgment.

For my part I am inclined to the view that the reasoning and conclusion in **Watson** are correct. I would therefore dismiss this appeal and affirm the conviction and sentence.

ORDER:

DOWNER, J.A.:

(1) Conviction for capital murder affirmed.

(2) By majority [Downer, JA dissenting, Bingham, Smith JJA]. Sentence of death affirmed.